In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No. 1125

STANDARD OIL COMPANY OF CALIFORNIA,
Appellant,

vs.

CHARLES G. JOHNSON, as Treasurer of the State of California,
Appellee.

Appeal from the Supreme Court of the State of California.

BRIEF FOR APPELLANT.

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Subject Index

	Page
Opinions Below	1
Jurisdiction	1
Statute Involved	5
Statement of the Case	5
Specification of Errors	6
Summary of Argument	8
Argument	8
I.	
This Court has power to review the ruling of the court below that Army Post Exchanges are not federal instrumentalities. If it should hold that Post Exchanges are federal instrumentalities, the judgment of the court below should be vacated and the case remanded for further proceedings without a determination of the validity of the state statute	8
II.	
United States Army Post Exchanges are instrumentalities of the federal government	12
III.	
The California Motor Vehicle Fuel License Tax Act, if construed to impose a tax on sales to Army Post Exchanges, is unconstitutional	24
Conclusion	29

Table of Authorities Cited

Cases

	Pages
Alabama v. King & Boozer, 314 U.S. 1	25, 28
Ashwander v. Tennessee Valley Authority, 297 U.S. 288	11
Breisch v. Central R. R. of N. J., 312 U.S. 484	10
Choctaw & Gulf R. R. v. Harrison, 235 U.S. 292	24
Dobbins v. Erie County, 16 Pet. 435	24
Dooley, F.T., Lumber Co. v. United States, 63 F.(2d) 384; cert. den. 290 U.S. 640	13
Dugan, Thomas B. v. The United States, 34 Ct. Cl. 458	13, 21
Educational Films Corp. v. Ward, 282 U.S. 378	29
Estate of Ross, 189 Cal. 317	3
Falls City Brewing Co. v. Reeves, 40 F.Supp. 35	16, 20
Farmers Bank v. Minnesota, 232 U.S. 516	24
Gratiot v. United States, 4 How. 80	13
Guardia v. Johnson, 134 Cal. App. 574	28
Helbush v. Helbush, 209 Cal. 758	3
Indian Motorcycle Co. v. U.S., 283 U.S. 570	25
Isenberg v. Superior Court of L.A. Co., 39 Cal.App.(2d) 106	3
Johnson v. Maryland, 254 U.S. 51	25
Keane v. United States, 272 Fed. 577	22, 23
Kurtz v. Moffitt, 115 U.S. 487	13
Lawrence v. State Tax Comm., 286 U.S. 276	29
McCulloch v. Maryland, 4 Wheat. 316	24
Minnesota v. National Tea Co., 309 U.S. 551	10
Old Homestead Bakery, Inc. v. Marsh, 75 Cal.App. 247	27
Osborn v. United States Bank, 9 Wheat. 738	24
Oswald v. Johnson, 210 Cal. 321	28
Pan American Petroleum Corporation v. State of Alabama, 67 F.(2d) 590	22
Patterson v. Alabama, 294 U.S. 600	12, 24
People v. Standard Oil Co., 218 Cal. 123	21, 22, 24

Pages

People v. Ventura Refining Co., 204 Cal. 286 ..... 26, 27
Post Exchange, 31st Infantry v. Grover C. Keeney (Reg. No. 30920, Aug. 20, 1929, Supreme Court of the Philippine Islands) 21
Puget Sound Co. v. King County, 264 U.S. 22 3

Query v. United States, No. 619, October Term, 1941 ..... 8, 11, 12, 18, 21
Query v. United States, 121 F.(2d) 631 24

Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 10
Rio Grande Oil Co. v. Los Angeles, 6 Cal.App.(2d) 200 .... 26, 27

Smith v. Whitney, 116 U.S. 167 13
Standard Oil Co. v. California, 291 U.S. 242 ..... 22, 28
Standard Oil Co. of California v. Johnson, 19 Advance California Reports 125 1
Standard Oil Co. v. Johnson, 10 Cal.(2d) 758 26
State Tax Comm'n v. Van Cott, 306 U.S. 511 ..... 10, 12

Thirty-first Infantry Post Exchange v. Posadas, 54 Phil. 866 22
Tipton v. Atchison Ry. Co., 298 U.S. 141 10

United States v. Eliason, 16 Pet. 291 ..... 12, 13
United States v. Morehead, 243 U.S. 607 13
United States v. Query, 37 F.Supp. 972; aff'd 121 F.(2d) 631; cert. den. 62 Sup. Ct. 295 ..... 13, 16, 17, 18, 21

Western L. Co. v. State Bd. of Equalization, 11 Cal.(2d) 156 26
Weston v. City Council of Charleston, 2 Pet. 449 24
Wisconsin v. J. C. Penney Co., 311 U.S. 435 29
Woog, Henry, Administrator, v. The United States, 48 Ct. Cl. 80 ..... 13, 21

Court Rules

Rules of the Supreme Court of California:
Rule XXX, sec. 1 ..... 3, 4

Constitutions, Statutes and Codes

Constitution of the United States 6
Constitution of California:
Article VI, sec. 1a 3

	Pages
Internal Revenue Code:	
Sec. 1426(b) 6 (26 U.S.C. p. 375)	20
Sec. 1607(c) 6 (26 U.S.C. p. 403)	20
Judicial Code:	
Sec. 237 (a) (b) (28 U.S.C. sec. 344 a, b)	4
Act of Congress of August 7, 1789, c. 7, 1 Stat. 49 (5 U.S. C. sec. 181)	12
Act of Congress of July 15, 1870, c. 294, §20, 16 Stat. 319 (10 U.S.C. 16)	13
Act of Congress of March 1, 1875, c. 115, 18 Stat. 337 (10 U.S.C. sec. 16)	13
Act of Congress of March 3, 1877, c. 103, §5, 19 Stat. 335 (as amended by c. 180, §20, 20 Stat. 362) (39 U.S.C. sec. 321)	16
Act of Congress of July 16, 1892, 27 Stat. 178 (10 U.S.C. sec. 1335)	2
Act of Congress of February 13, 1925, c. 229, § 8(a), 43 Stat. 940 (28 U.S.C. sec. 350)	2, 4
Act of Congress of January 31, 1928, c. 14, 45 Stat. 54 (28 U.S.C. secs. 344(a), 861a)	2
Act of Congress of March 4, 1933, c. 281, 47 Stat. 1571, 1573	17
Act of Congress of June 16, 1933, c. 101, 48 Stat. 283, 303	17
Act of Congress of June 26, 1934, c. 756, §8, 48 Stat. 1224, 1229 (31 U.S.C. 725g)	17
Act of Congress of August 14, 1935, c. 531, §811(b) (6), 49 Stat. 620, 639 (42 U.S.C. sec. 1011 (a) (6) (Social Security Act, Title VIII)	19
Act of Congress of August 14, 1935, c. 531, §907 (c) (5), 49 Stat. 620, 643 (42 U.S.C. sec. 1107 (c) (5) (Social Security Act, Title IX)	19
32 Stat. 937, 938	16
33 Stat. 270	16
33 Stat. 836	16
34 Stat. 253, 1169	16
35 Stat. 119, 516, 744	16
36 Stat. 255, 1050	16
37 Stat. 582, 619, 715	16
38 Stat. 364, 1076	16
39 Stat. 636	16
40 Stat. 56, 195, 363, 479, 830, 862, 1029	16

Pages

41 Stat. 118, 963, 1184 16
42 Stat. 83, 719, 1056, 1167, 1380 16-17
43 Stat. 480, 711, 895 17
44 Stat. 190, 256, 1108 17
45 Stat. 49, 329, 1352 17
46 Stat. 435, 1280 17
47 Stat. 667, 696, 1573, 1601 17
48 Stat. 617, 642 17
49 Stat. 124, 148, 1281, 1309 17
50 Stat. 445, 468 17
52 Stat. 645, 667 17
53 Stat. 596, 618 17
54 Stat. 354, 378, 966 17

California Motor Vehicle Fuel License Tax Act (Cal. Stats. 1923, pp. 572, 573, 574, as amended by Cal. Stats. 1925, p. 660; Cal. Stats. 1927, p. 1309, Cal. Stats. 1931, p. 113; Cal. Stats. 1933, pp. 1636, 1637, 1638, 1639; Cal. Stats. 1935, pp. 1646, 1696; and Cal. Stats. 1937, p. 2219 ..... 5, 6, 7, 8, 9, 28
Sec. 3 26
Sec. 10 ..... 5, 6, 10
Sec. 11 27-28

Other Authorities

Army Regulations, No. 210-65 (issued June 29, 1929) 5

Comptroller's Decisions, vol. 19, pp. 515, 517 19

Executive Order, February 6, 1934, No. 6589 18

Opinions of Attorney General:
Vol. 37, pp. 435, 437 18
Vol. 39, pp. 316, 319 19

Opinions of the Judge Advocate General:
No. 153, November 6, 1919 18
(JAG 012.312) February 17, 1937 ..... 13-14, 17, 18

Internal Revenue Bulletin:
Cumulative Bulletin XII—1, 419, 420, S.T. 620 19
Cumulative Bulletin 1938—1, p. 441, S.S.T. 269 19
Cumulative Bulletin 1940—1, p. 202, S.S.T. 385 20

War Department Circular No. 129, 1919 17

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BRIEF FOR APPELLANT.

OPINIONS BELOW.

The opinion of the Supreme Court of the State of California (R. 76) is reported at 19 Advance California Reports 125; 119 P. (2d) 329. No opinion was rendered by the trial court; its conclusions of law and judgment are at R. 73, 74.

JURISDICTION.

The judgment of the Supreme Court of California became final on December 30, 1941, and was entered on that

day (Supplemental Certificate of the Clerk of the Supreme Court of California, R. 90). The appeal was allowed March 23, 1942 (R. 85-86). This Court has jurisdiction under section 237(a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Act of January 31, 1928 (28 U.S.C. 344(a), 861a).

The order postponing the question of the jurisdiction of this Court to the hearing on the merits (R. 89) indicates that when the jurisdictional statement was considered, the Court might have doubted the timeliness of the appeal. This doubt, if it existed, probably arose from the form of the Clerk's certificate appearing at R. 76. This certificate recites that

> "the foregoing is a true copy of an original judgment *entered*[1] in the above entitled cause on the 29th day of November, 1941, * * *."

This certificate is in traditional form but is misleading when read with section 8(a) of the Act of February 13, 1925, which provides:

> "That no * * * appeal * * * shall be allowed * * * unless application therefor be duly made within three months after the *entry* of such judgment or decree, * * *."

Under California law and practice the certificate should read,

> "the foregoing is a true copy of an original judgment pronounced [*not* "entered"] in the above entitled cause on the 29th day of November, 1941."

To clarify the record, appellant obtained a certificate from the Clerk of the Supreme Court of California (R.

[1]Italics throughout this brief are ours.

90). This points out that the judgment was "pronounced" on November 29, 1941, but did not become final and was not "entered" until December 30, 1941. Under these circumstances the appeal is timely (*Puget Sound Co. v. King County*, 264 U.S. 22).

The California law and practice which produced the above ambiguity in the record and which required the filing of the supplemental certificate is as follows:

The judgment in this case was pronounced by the Supreme Court of California in bank. Rule XXX, section 1, of the Rules of the Supreme Court of California provides:

> "Unless otherwise specially ordered, or a rehearing be granted, judgments of the Supreme Court in bank become final at the end of the thirtieth day after the date of pronouncement."[2]

Under this rule a judgment of the court in bank is merely "pronounced" on the day the decision is rendered and the opinion filed. During the following thirty-day period the judgment is tentative and may be modified by the court on its own motion or on the motion of the parties. At the expiration of thirty days the judgment becomes final.[3]. Thereupon, the formal judgment of the court is for the first time prepared and entered in the judgment book of the court (Supplemental Certificate, R. 90).

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[2]This rule was promulgated by the Judicial Council of California, established by the Constitution of that State (Art. VI, sec. 1a). The rules of the Judicial Council have "the force of positive law" (*Helbush v. Helbush*, 209 Cal. 758, 763; *Isenberg v. Superior Court of L. A. Co.*, 39 Cal. App. (2d) 106, 108-109).

[3]Rule XXX, sec. 1, Rules of the Supreme Court of California; *Estate of Ross*, 189 Cal. 317, 318.

The opinion of the Supreme Court of California herein was filed on November 29 (R. 76) and the last paragraph reads (R. 83):

> "For the reasons herein stated the judgment is affirmed."

Under the law of California this constituted the "pronouncement" of the judgment. On December 30, 1941, the judgment so pronounced became final (Rule XXX, supra) and was prepared and "entered" (Supplemental Certificate, R. 90). The appeal herein, allowed on March 23, 1942 (R. 85-86), was applied for "within three months after the entry of such judgment or decree" (sec. 8(a), Act of February 13, 1925).

If doubt remained it would be dispelled by section 237 (a) and (b) of the Judicial Code, providing that this Court may review, either on appeal or certiorari, "a final judgment or decree" of a state court. Since judgments of the Supreme Court of California do not become final until thirty days after their pronouncement, an appeal or application for certiorari during this thirty-day period would be premature. When section 8(a) of the Act of February 13, 1925, is read, as it must be, with section 237 (a) and (b) of the Judicial Code, it is clear that section 8(a) means that no appeal or writ of certiorari shall be allowed or entertained unless application therefor be made within three months of the entry of the *final* judgment or decree, that is, the *reviewable* judgment or decree.

STATUTE INVOLVED.

The relevant provisions of the California Motor Vehicle Fuel License Tax Act (Cal. Stats. 1923, pp. 572, 573, 574, as amended by Cal. Stats. 1925, p. 660; Cal. Stats. 1927, p. 1309; Cal. Stats. 1931, p. 113; Cal. Stats. 1933, pp. 1636, 1637, 1638, 1639; Cal. Stats. 1935, pp. 1646, 1696, and Cal. Stats. 1937, p. 2219) are set out in Appendix A.

STATEMENT OF THE CASE.

In March, 1941, appellant sold gasoline to the 250 Coast Artillery Post Exchange, Camp McQuaide, Watsonville, California, to the Eleventh Cavalry Post Exchange, Campo, California, and to the United States Army Post Exchange, Seeley, California (R. 2, 72). No one of these Post Exchanges is located on a Government reservation over which the Federal Government has exclusive jurisdiction (R. 2, 72).

These Post Exchanges were organized and operated under Army Regulations 210-65 (issued June 29, 1929), as amended (R. 4, 7-71, 72).

The State of California collected the tax in suit under the California Motor Vehicle Fuel License Tax Act (Appendix A, infra). Appellant paid the tax under protest and brought this suit to recover the tax in the Superior Court, which is the California court of general jurisdiction in first instance.

The complaint alleged (1) that the sales of gasoline to the Army Post Exchanges were exempt under section 10 of the Act, providing that the tax shall not apply,

> "* * * to any motor vehicle fuel sold to the government of the United States or any department thereof for official use of said government, * * *"

and (2) that if the Act is construed and applied to impose a tax upon such sales it is unconstitutional as imposing a burden on instrumentalities or agencies of the United States and subjecting them to regulation beyond the power of the State (R. 4-5).

The State filed an answer admitting the facts alleged in the complaint (R. 72). The case was tried upon the pleadings. The trial court gave judgment for the State, holding that Post Exchanges are not instrumentalities of the United States and therefore not within the exemption of section 10 of the Act. The court also necessarily held that the Act, so construed and applied, was not in violation of the Constitution of the United States (R. 73, 74).

Upon appeal the Supreme Court of California affirmed the judgment of the Superior Court, basing its decision, as did the trial court, upon the ruling that Post Exchanges are not instrumentalities of the Federal Government.

SPECIFICATION OF ERRORS.

The Supreme Court of California erred:

1. In upholding the validity of the Motor Vehicle Fuel License Tax Act (Appendix A, infra) when applied to sales of gasoline made to the 250 Coast Artillery Post Exchange, Camp McQuaide, Watsonville, California, to the Eleventh Cavalry Post Exchange, Campo, California, and

to the United States Army Post Exchange, Seeley, California;

2. In holding that sales of gasoline to the 250 Coast Artillery Post Exchange, Camp McQuaide, Watsonville, California, to the Eleventh Cavalry Post Exchange, Campo, California, and to the United States Army Post Exchange, Seeley, California, are subject to excise taxes imposed by the California Motor Vehicle Fuel License Tax Act;

3. In holding that the 250 Coast Artillery Post Exchange, Camp McQuaide, Watsonville, California, the Eleventh Cavalry Post Exchange, Campo, California, and the United States Army Post Exchange, Seeley, California, are not instrumentalities of the Federal Government but are voluntary, unincorporated, cooperative associations of Army organizations largely engaged in business of a private nature;

4. In holding that sales of gasoline to the 250 Coast Artillery Post Exchange, Camp McQuaide, Watsonville, California, the Eleventh Cavalry Post Exchange, Campo, California, and the United States Army Post Exchange, Seeley, California, are not sales to the Government of the United States or a department thereof for the official use of the Government;

5. In affirming the judgment of the Superior Court of the State of California in and for the County of Sacramento in favor of appellee.

SUMMARY OF ARGUMENT.

(1) This Court has power to review the decision that Army Post Exchanges are not instrumentalities of the United States. If the Court in this case and the companion case of *Query v. United States*, No. 619, October Term, 1941, should hold that Army Post Exchanges are federal instrumentalities, its appropriate action would be to vacate the judgment and remand the case for further proceedings by the state court without passing upon the validity of the state statute.

(2) Army Post Exchanges are instrumentalities of the United States Government.

(3) The California Motor Vehicle Fuel License Tax Act, if construed to impose a tax on sales to Army Post Exchanges, is unconstitutional.

ARGUMENT.

I.

THIS COURT HAS POWER TO REVIEW THE RULING OF THE COURT BELOW THAT ARMY POST EXCHANGES ARE NOT FEDERAL INSTRUMENTALITIES. IF IT SHOULD HOLD THAT POST EXCHANGES ARE FEDERAL INSTRUMENTALITIES THE JUDGMENT OF THE COURT BELOW SHOULD BE VACATED AND THE CASE REMANDED FOR FURTHER PROCEEDINGS WITHOUT A DETERMINATION OF THE VALIDITY OF THE STATE STATUTE.

The case presents initial questions with respect to the scope of review and the action appropriately to be taken by this Court. The court below considered two questions (R. 77):

> "Has the State of California the right and power to impose such tax on gasoline sold to United States

> Army Post Exchanges; and if the state has the right to impose such a tax, have sales to army post exchanges been exempted from the payment thereof by section 10 of the Motor Vehicle Fuel License Tax Act?"

The court answered both questions by holding that Army Post Exchanges are not instrumentalities of the United States. In so doing, it decided a federal question subject to review here on either of two grounds:

(1) In the court below appellant contended, first, that Army Post Exchanges are federal instrumentalities and that sales to the Exchanges, therefore, are exempted from the tax by section 10 of the Act (supra, pp. 5-6). Whether the state statute should be construed to exempt these sales is, in the ultimate, a question of state law. However, in deciding this question, the California Supreme Court based its ruling as to the application of the state statute entirely upon its decision of the related but separate federal question whether Post Exchanges are government instrumentalities. In so far as its decision involved the construction of the state statute, the court held that section 10 exempts sales to "instrumentalities of the United States"; then, having so construed the statute, it affirmed the judgment upon the ground that Post Exchanges are not federal instrumentalities under federal law. Among other things, the court said (R. 81-82, 82-83):

> "We do not find that the Supreme Court of the United States has ever directly passed upon the legal status of military post exchanges, yet the question has been before it on three different occasions:
> * * *

> It seems to us after a study of the authorities upon the question before us, that the great weight of authority is in favor of the ruling of the trial court, holding that an army post exchange is not an instrumentality or department of the federal government, but, on the other hand, 'is an organization largely engaged in business of a private nature and that sales to it should not be beyond the reach of the taxing power of the state wherein it is located.'"

The decision of the state court, therefore, does not rest "upon an independent determination of the state law" (*State Tax Comm'n v. Van Cott*, 306 U.S. 511, 514). It held the exemption provided in section 10 to be inapplicable only by applying "federal law * * * to a solution of a state's problems" (*Breisch v. Central R.R. of N. J.*, 312 U.S. 484, 491). Its decision rests entirely on a determination of federal law and on a complete misconception of federal law (id., p. 491). Under such circumstances, this Court has power to determine the federal question upon which the state court based its decision, and thereafter to remand the case to the state court for further proceedings.

State Tax Comm'n v. Van Cott, 306 U.S. 511;
Breisch v. Central R. R. of N. J., 312 U.S. 484, 491;
Minnesota v. National Tea Co., 309 U.S. 551;
Tipton v. Atchison Ry. Co., 298 U.S. 141, 151-155;
Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 120.

(2) Appellant's second contention below was that Army Post Exchanges are federal instrumentalities and that if the state statute were construed to impose a tax in respect of sales to Post Exchanges, it would be invalid under

the federal constitution. On this phase of the case, determination of whether Army Post Exchanges are federal instrumentalities is purely a federal question.

On either of the foregoing grounds, this Court has power to determine whether Army Post Exchanges are federal instrumentalities. In view of the decision below, however, we submit that if this Court should determine that they are federal instrumentalities, it should not exercise its power to hold the California statute unconstitutional, but would more appropriately vacate the judgment and remand the case to the Supreme Court of California for further proceedings. It is a settled rule of this Court not to pass unnecessarily on the constitutionality of a statute. See the authorities reviewed in the concurring opinion of Mr. Justice Brandeis in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341, 346, et seq.) Upon remand the court below will have an opportunity, in the light of the ruling of this Court that Post Exchanges are federal instrumentalities, to determine whether the state statute nevertheless imposes the tax. If in these circumstances it holds that the statute does not impose the tax, all necessity for determining the validity of the statute will be eliminated.

A further fact makes it particularly appropriate that this Court, after deciding the Post Exchange question, should remand the case for further proceedings. On April 14 this Court issued a writ of certiorari to the Fourth Circuit in *Query v. United States*, No. 619, October Term, 1941. That case also involves the question whether Post Exchanges are federal instrumentalities, and it is set for argument immediately preceding the argument in the case at bar. If this Court should decide in the

Query case that Post Exchanges are federal instrumentalities, it should not deny the Supreme Court of California an opportunity to reexamine its decision "in the light of the situation which has now developed" (*Patterson v. Alabama*, 294 U.S. 600, 607). Instead, it should exercise its "power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require the Court is bound to consider a change, either in fact or in law, which has supervened since the judgment was entered."

Patterson v. Alabama, 294 U.S. 600, 607;
State Tax Comm'n v. Van Cott, 306 U.S. 511, 515, 516.

II.

UNITED STATES ARMY POST EXCHANGES ARE INSTRUMENTALITIES OF THE FEDERAL GOVERNMENT.

United States Army Post Exchanges are organized, owned and operated in accordance with Army Regulations issued by the Secretary of War with the sanction of the President of the United States as Commander in Chief (R. 4, 72, 7[illegible]71).[4] These regulations are promulgated pur-

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[4] "The secretary of war is the regular constitutional organ of the president, for the administration of the military establishment of the nation; and rules and orders publicly promulgated through him must be received as the acts of the executive, and as such, be binding upon all within the sphere of his legal and constitutional authority. (*United States v. Eliason*, 16 Pet. 291, 302).

See, also, the Act of August 7, 1789, establishing the Department of War, c. 7, 1 Stat. 49.

suant to statutory authority.[5] They have the force of law.[6]

A brief history of the Post Exchange and predecessor institutions appears in a recent opinion of the Judge Advocate General, holding that Post Exchanges are federal instrumentalities and not subject to personal property taxes and registration fees of the District of Columbia (JAG 012.312, War Department, J.A.G.O.,—Feb. 17, 1937). The Judge Advocate General said:

> "The post exchange institution, then sometimes called 'canteen', existence of which was recognized by Congress as early as June 16, 1890 (26 Stat. 154), supplanted the 'post trader' institution, which had been authorized by the act of July 24, 1876 (19 Stat. 100) as a substitute for the institution of 'Army

[5] Act of July 15, 1870, c. 294, sec. 20, 16 Stat. 319:

"That the Secretary of War shall prepare a system of general regulations for the administration of the affairs of the army, which, when approved by Congress, shall be in force and obeyed until altered or revoked by the same authority; and said regulations shall be reported to Congress at its next session: *Provided*, That said regulations shall not be inconsistent with the laws of the United States."

Act of March 1, 1875, c. 115, 18 Stat. 337:

"That so much of section twenty of the act approved July fifteenth, eighteen hundred and seventy, entitled 'An act making appropriations for the support of the Army for the year ending June thirtieth, eighteen hundred and seventy-one, and for other purposes,' as requires the system of general regulations for the Army therein authorized to be reported to Congress at its next session, and approved by that body, be, and the same is hereby, repealed; and the President is hereby authorized, under said section, to make and publish regulations for the government of the Army in accordance with existing laws."

[6] See: *United States v. Query*, 37 F. Supp. 972, 975 (aff'd 121 F. (2d) 631; cert. den. 62 Sup. Ct. 295); *Henry Woog, Administrator, v. The United States*, 48 Ct. Cl. 80, 88, 89; *Thomas B. Dugan v. The United States*, 34 Ct. Cl. 458; *United States v. Morehead*, 243 U. S. 607; *Smith v. Whitney*, 116 U. S. 167, 181; *Kurtz v. Moffitt*, 115 U. S. 487, 503; *Gratiot v. United States*, 4 How. 80, 117, 118; *United States v. Eliason*, 16 Pet. 291, 302; *F. T. Dooley Lumber Co. v. United States*, 63 F. (2d) 384; cert. den. 290 U. S. 640.

sutler', abolished and its functions transferred to the Subsistence Department of the Army by section 25 of the act approved July 28, 1866 (14 Stat. 332, 336). The ancient institution of 'sutler' was inherited from the Continental Army, 'to the articles, rules and regulations' of which it was made amenable by act of June 30, 1775 (2nd Continental Congress, Journal of Congress, vol. 1, pp. 90, 93). And by act of September 20, 1776, the Continental Congress prescribed regulations for sutlers and that supervision of 'suttling' was a military duty of station commanders (Journal of Congress, vol. 1, pp. 482, 485). (16 Op. Atty. Gen. 658; Kenny v. U.S., 62 Ct. Cl. 328, 335).

Said statutory authorization for appointment of 'post traders' was terminated by the act approved January 28, 1893 (27 Stat. 426), prior to which the post exchange institution had been established in the Army—and authorized by Congress to use public buildings and public transportation when available, by the act of July 16, 1892 (27 Stat. 178).

* * * * * * *

Thus, it is apparent, that the Congress terminated the institution of 'post trader' which it had inaugurated to meet certain needs of the Army, in the light of the knowledge that the institution of the Army post exchange had been established upon the executive authority of the President as constitutional Commander-in-Chief of the Army and was meeting those needs in a better manner, and to the greater good of the Army, and with more advantage to the Federal Government than had been done under the post trader institution, which it accordingly abolished, and in lieu of which reliance has thenceforward been had upon the post exchange."

Post Exchanges are intended to aid the comfort and morale of enlisted men. Specifically, the Army Regulations provide that their primary purposes are (R. 9):

"(1) To supply troops, at the lowest possible prices, with articles of ordinary use, wear, and consumption not supplied by the Government.

(2) To afford to troops means of rational recreation and amusement.

(3) Through exchange profits to provide, when necessary, the means for improving the company messes."

The regulations prescribe in every detail for the formation, ownership and operation of Post Exchanges (R. 7-71).

Sales by Post Exchanges may be made only to

"(1) Such personnel and organizations as are now or may be hereafter authorized by law and regulation to purchase subsistence stores or other quartermaster supplies * * *.

(2) Civilians employed or serving at military posts" (R. 63).

Post Exchanges are conducted by officers regularly assigned to such duty by Army orders (R. 14-20, 57-58, 63, 68); they are supervised by Post Exchange Councils, likewise composed of Army officers assigned to such duty (R. 15-17); they are under the control of the post commanders (R. 8, 14). No officer can share in or benefit from Post Exchange profits, or receive any bounty or gratuity at its expense (R. 11-12, 54-55, 67-68). Officers conducting Post Exchanges are rendering regular military service. They receive their army pay and no additional compensation (R. 17).

None of the capital of the Post Exchange is individually owned, none of its profits go to any individual for personal use. The members of the Exchange are "com-

panies, troops, batteries, aero squadrons, or other similarly organized units and detachments'' of the Army (R. 10). Profits go to post recreation funds, libraries, Chaplain's fund, band funds, and other detachment funds—the expenditures being prescribed by the Army Regulations (R. 11-12, 54-55, 67-68). Each of these funds in turn serves a governmental purpose, including the improvement of messes, the benefit of the sick in the hospital, and in general, the moral, mental and physical improvement of the troops (R. 11-12).[7]

Post Exchanges are authorized to use Government supplies (R. 42) and to occupy Government buildings (R. 37-38);[8] their business messages are transmitted free of charge over War Department telegraphs, cables and radios (R. 41);[9] they are entitled to the legal services of the United States Attorney to protect their rights and interests (R. 50); their mail is carried free of postage (R. 46) under the federal statute providing that

> "It shall be lawful to transmit through the mail, free of postage, any letters, packages, or other matters relating exclusively to the business of the Government of the United States; official mail matter of all officers of the United States Government, * * *" (39 U.S.C. 321).

Congress has periodically appropriated funds for the construction, equipment and maintenance of Post Exchange buildings.[10]

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[7] *United States v. Query*, 37 F. Supp. 972, 974.
[8] See *Falls City Brewing Co. v. Reeves*, 40 F. Supp. 35, 39.
[9] *United States v. Query*, 37 F. Supp. 972, 974.
[10] See, 32 Stat. 937, 938; 33 Stat. 270; 33 Stat. 836; 34 Stat. 253, 1169; 35 Stat. 119, 516, 744; 36 Stat. 255, 1050; 37 Stat.

In 1933, Congress provided that the unobligated balances of Post Exchange funds be paid into the Federal Treasury.[11] Later part of these funds were made available to the Veterans Administration for payment of expenses of indigent World War veterans,[12] and still later the balance was put in the surplus fund of the Treasury.[13]

582, 619, 715; 38 Stat. 364, 1076; 39 Stat. 636; 40 Stat. 56, 195, 363, 479, 830, 862, 1029; 41 Stat. 118, 963, 1184; 42 Stat. 83, 719, 1056, 1167, 1380; 43 Stat. 480, 711, 895; 44 Stat. 190, 256, 1108; 45 Stat. 49, 329, 1352; 46 Stat. 435, 1280; 47 Stat. 667, 696, 1573, 1601; 48 Stat. 617, 642; 49 Stat. 124, 148, 1281, 1309; 50 Stat. 445, 468; 52 Stat. 645, 667; 53 Stat. 596, 618; 54 Stat. 354, 378, 966. The statutes making these appropriations are commented upon by the Judge Advocate General in his opinion of February 17, 1937, supra, p. 13:

> "In addition to the specific instances of congressional recognition of the Army post exchange as an agency and instrumentality of the Federal Government heretofore pointed out, attention is invited to the many instances of congressional recognition of the post exchange as entitled to receive support from public funds appropriated from the Federal Treasury. Since 1892 Congress has appropriated some eleven million dollars to the support and maintenance of the post exchange, by some forty odd acts. Indeed, almost annually, for more than thirty years Congress has had recourse to and reliance upon the Army post exchange institution for the accomplishment of certain functions or activities supported by the Congress from the public revenues, under its constitutional power 'To raise and support Armies * * *' (art. I, sec. 8, cl. 12, Const.)."

[11] Act of March 4, 1933, c. 281, 47 Stat. 1571, 1573; *United States v. Query*, 37 F. Supp. 972, 976; Opinion of the Judge Advocate General, February 17, 1937, supra p. 13.

[12] Act of June 16, 1933, c. 101, 48 Stat. 283, 303.

[13] Act of June 26, 1934, c. 756, sec. 8, 48 Stat. 1224, 1229.

Under a 1919 War Department Directive (1919, War Department Circular 129), funds of demobilized organizations were ordered turned in to the War Department. Post Exchange funds of disbanded organizations fell within the provisions of this directive (Opinion of the Judge Advocate General 153, November 6, 1919).

Executive and administrative rulings for more than half a century have held that Post Exchanges are federal instrumentalities. As was said in *United States v. Query*, 37 F. Supp. 972, 976:[14]

> "The President of the United States, the heads of the various departments of the United States, to whose opinions the courts always give great weight, New York ex rel. Rogers v. Graves, 299 U.S. 401, 406, 407, 57 S. Ct. 269, 81 L.Ed. 306, including the Attorney General, the Comptroller of the Treasury, the Comptroller General, the Postmaster General, the Secretary of War, the Secretary of the Navy, and the Commissioner of Internal Revenue, have in many instances held that Post Exchanges and their predecessors were federal instrumentalities."

We have referred to one of the many rulings of the Judge Advocate General (supra, pp. 13-14), and shall cite only a few additional illustrative rulings by the Departments of the Government.

By Executive Order dated February 6, 1934, No. 6589, the President of the United States declared that:

> "* * * this order shall apply to and include all vehicles owned and operated by the United States Government and by legally authorized instrumentalities thereof, such as post exchanges, * * *."

This Executive Order was submitted to, and had the approval as to form and legality by, the Attorney General.[15]

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[14]The decision of the Circuit Court of Appeals in this case is pending before this Court on writ of certiorari, No. 619, October Term, 1941.

[15]37 Op. Att. Gen. 435, 437.

On August 5, 1939, Acting Attorney General Robert H. Jackson rendered an opinion that Army Post Exchanges are federal instrumentalities and, as such, not subject to the Hawaii Tobacco Tax Act. The opinion reviews the authorities relating to the question and concludes:

> "From the above authorities it seems well settled that Army post exchanges are instrumentalities of the Federal Government, * * *" (39 Op. Att. Gen. 316, 319).

Consistent with many other rulings of the Treasury Department and of the Comptroller General,[16] the Treasury Department recently held[17] that Army Post Exchanges are instrumentalities of the United States within the meaning of section 811 (b) 6, Title VIII, and section 907 (c) 5, Title IX, of the Social Security Act. These subsections except from the term "employment" "service performed in the employ of the United States Government, or of an instrumentality of the United States." The ruling states (p. 442):

> "Under the facts stated, it appears that Army post exchanges are engaged in carrying out functions of

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[16]For example:

The Comptroller General on February 8, 1913, in a decision holding that stoppage against the pay of enlisted men of the Army may be made to reimburse the Post Exchange Fund, said (19 Comp. Dec. 515, 517):

> "Now, the funds of the post exchange are moneys used in carrying on this public agency; and the Government has a right to protect its instrumentalities * * *."

The Treasury Department, in S.T. 620, Cumulative Bulletin XII-1, 419, 420, held:

> "The Department consistently held that post exchanges, being governmental agencies, were exempt from the taxes imposed by various Revenue Acts in the past where such taxes would have been imposed directly upon the post exchange as the taxpayer, on the ground that it is not the policy of the Government to tax its own enterprises."

[17]S. S. T. 269, C. B. 1938-1, 441.

> the United States Government. It is accordingly held that such exchanges are instrumentalities of the United States and that neither such exchanges nor their employees are subject to the taxes imposed by Titles VIII and IX of the Social Security Act."

In a later and related decision, the Treasury Department held[18] that Army Post Exchanges are "wholly-owned" instrumentalities of the United States within sections 1426(b) 6 and 1607 (c) 6 of the Internal Revenue Code. These two subsections were incorporated into the Internal Revenue Code from the Social Security Act. Amendments of 1939 to that Act relative to the term "employment" except therefrom, "Service performed in the employ of the United States Government, or of an instrumentality of the United States which is (A) wholly owned by the United States, or (B) exempt from the taxes imposed by section 1410 by virtue of any other provision of law; * * *." The ruling states (p. 202):

> "A partial description of the organization and activities of Army post exchanges is contained in S. S. T. 269, supra. Additional facts now submitted relative to the organization, ownership, and operation of such post exchanges show that they are wholly owned by the United States within the meaning of sections 1426(b) 6 and 1607 (c) 6 of the Internal Revenue Code, as amended."[19]

The court decisions are to the same effect. In *Falls City Brewing Co. v. Reeves*, 40 F. Supp. 35, the court said (pp. 39-40):

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[18] S. S. T. 385, C. B. 1940-1, 202.

[19] The decision to the contrary quoted in the opinion of the court below (R. 82) is by the Board of Tax Appeals for the District of Columbia, *not* the United States Board of Tax Appeals.

"There can be no real doubt but that the Post Exchange as it is presently operated under army regulations, promotes in a large measure the welfare of the military personnel and that except for such operations the Government would itself be called upon to supply such facilities. Considered in this light it is certainly a subordinate or auxiliary agency and falls easily within the accepted definition of an instrumentality of the United States."

In accord are:

United States v. Query, 37 F. Supp. 972; affirmed 121 F. (2d) 631;[20]

Henry Woog, Administrator v. The United States, 48 Ct. Cl. 80, 88-89;

Thomas B. Dugan v. The United States, 34 Ct. Cl. 458;

Post Exchange, 31st Infantry v. Grover C. Keeney (Reg. No. 30920, Aug. 20, 1929, Supreme Court of the Philippine Islands).

In the light of all the foregoing—cases, statutes, administrative rulings, custom, history, purpose, and actual manner of operation—we submit that there is no warrant whatever for the ruling below that the post exchange "is not an instrumentality or department of the federal government, but, on the other hand, 'is an organization largely engaged in business of a private nature * * *' " (R. 82-83). A brief reference will, nevertheless, be made to the authorities cited in the opinion below.

The court below cited,

People v. Standard Oil Co., 218 Cal. 123;

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[20] This case is now before this Court on writ of certiorari granted April 14, 1942, No. 619, October Term, 1941.

Thirty-First Infantry Post Exchange v. Posadas, 54 Phil. 866;

Keane v. United States, 272 Fed. 577;

Pan American Petroleum Corporation v. State of Alabama, 67 F. (2d) 590.

People v. Standard Oil Co., a prior decision of the court below, was reversed by this Court on other grounds (291 U. S. 242; see p. 28, infra).

The *Posadas* case did not hold that Post Exchanges are not federal instrumentalities (54 Phil., 877):

> "We rule that an Army Post Exchange, although an agency within the United States Army, cannot secure exemption from taxation * * *."

This ruling was put upon the grounds (1) that the Philippine tax act in question had been ratified by Congress and that Congress thereby had consented to the imposition of the tax, and (2) that regardless of this ratification, and regardless of the fact that Army Post Exchanges might be federal instrumentalities, the tax in question was valid.

Keane v. United States, supra, involved the question whether an Army Post Exchange "is such a lawful department of the government as to bring it within the protection of section 37 of the Criminal Code." That section makes it a criminal offense to "conspire either to commit any offense against the United States, or to defraud the United States." The court's decision was based upon a strict construction of this penal statute. In so far as the court dealt with the question here involved its opinion was based, at least in part, upon an erroneous premise. It said (p. 587):

"We think that this highly penal statute cannot apply to any lawful department, so as that a fraud upon the United States can arise from or be involved in any transaction concerning it, unless such lawful department is created by Congress or directly authorized by it, and in addition thereto it must be 'such a lawful department' as that Congress appropriates the public moneys to maintain and operate."

The opinion then cites the Act of July 16, 1892 (27 Stat. 178),

"* * * hereafter, no money appropriated for the support of the Army shall be expended for post gardens * * * or exchanges"

and adds (p. 583):

"And in passing we might say that this is the only reference to a post exchange that we have been able to find in the mass of statutes passed by Congress from its first session down to the present. Congress has recognized the importance of, and necessity for, post schools and post bakeries, and expressly provides for them."

The fact is that Congress on numerous occasions has appropriated money for Post Exchanges (supra, pp. 16-17).

Elsewhere in its opinion the court said (272 Fed. p. 581):

"Nowhere in these regulations do we find a rule or even a suggestion that under any possible contingency does or would the government ever receive or come into possession of any of the funds or assets of the exchange."

As pointed out above, Congress has provided that unobligated balances of Post Exchange funds be paid into the Federal Treasury (supra, p. 17).

Beyond this, the same court that decided the *Keane* case recently held that Post Exchanges are instrumentalities of the Federal Government (*Query v. United States*, 121 F.(2d) 631).

In *Pan American Petroleum Corp. v. Alabama*, supra, the court gave little consideration to the question whether Army Post Exchanges are instrumentalities of the Federal Government. The statement in the opinion on this point is a dictum; the only authority cited was the decision of the Supreme Court of California in *People v. Standard Oil Co.*, discussed at p. 22, supra.

III.

THE CALIFORNIA MOTOR VEHICLE FUEL LICENSE TAX ACT, IF CONSTRUED TO IMPOSE A TAX ON SALES TO ARMY POST EXCHANGES, IS UNCONSTITUTIONAL.

Although the recent decisions of this Court have changed in many respects the law relating to reciprocal exemptions from taxation of the State and Federal Governments, it is the law today, as it has been since the decision of this Court in *McCulloch v. Maryland*, 4 Wheat. 316, that the states may not impose taxes upon the Federal Government and its instrumentalities, or upon the transactions of either.

Osborn v. United States Bank, 9 Wheat. 738, 865, 867;

Weston v. City Council of Charleston, 2 Pet. 449, 463, 465-466;

Dobbins v. Erie County, 16 Pet. 435, 443, 447;

Farmers Bank v. Minnesota, 232 U.S. 516, 526;

Choctaw & Gulf R. R. v. Harrison, 235 U.S. 292;

Johnson v. Maryland, 254 U.S. 51.
Indian Motorcycle Co. v. U. S., 283 U.S. 570;
Alabama v. King & Boozer, 314 U.S. 1.

"With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the State's inability to interfere has been regarded as established since *McCulloch v. Maryland*, 4 Wheat. 316. The decision in that case was not put upon any consideration of degree but upon the entire absence of power on the part of the States to touch, in that way at least, the instrumentalities of the United States; 4 Wheat. 429, 430; and that is the law today" (Holmes, J., *Johnson v. Maryland*, 254 U.S. 51, 55).

The reasoning of certain decisions—that a tax upon individuals is invalid if the economic burden of the tax is passed on to the Government—has been rejected.

"The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see *Panhandle Oil Co. v. Knox, supra; Graves v. Texas Co., supra*, we think it no longer tenable" (*Alabama v. King & Boozer*, 314 U.S. 1, 9).

But no case upholds a tax laid directly upon the Government or directly upon a transaction of the Government. The tax sustained in *Alabama v. King & Boozer* was upon a transaction between two individuals which *preceded* the transaction with the Government. Upon this ground the tax was upheld (314 U.S., 9, 12):

"The contention of the Government is that the tax is invalid because it is laid in such manner that, in

> the circumstances of this case, its legal incidence is on the Government rather than on the contractors, who ordered the lumber and paid for it but who, as the Government insists, have so acted for the Government as to place it in the role of a purchaser of the lumber. • • •
>
> The soundness of this conclusion turns on the terms of the contract and the rights and obligations of the parties under it. • • •
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> • • • • • • • •
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> We think, as the Supreme Court of Alabama held, that the legal effect of the transaction which we have detailed was to obligate the contractors to pay for the lumber. The lumber was sold and delivered on the order of the contractors, which stipulated that the Government should not be bound to pay for it. It was in fact paid for by the contractors, who were reimbursed by the Government pursuant to their contract with it. The contractors were thus purchasers of the lumber, within the meaning of the taxing statute, and as such were subject to the tax."

In contrast, the "legal incidence" of the tax here in question was upon the Government. It is true that the California statute nominally imposes the tax upon the distributor:

> "A license tax is hereby imposed for the privilege of distributing • • • any motor vehicle fuel" (sec. 3, Appendix, p. i, infra).

And the California Supreme Court in several cases has characterized the tax as one upon distributors.[21] But in

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[21] *Rio Grande Oil Co. v. Los Angeles*, 6 Cal. App. (2d) 200, 201; *People v. Ventura Refining Co.*, 204 Cal. 286, 294; *Western L. Co. v. State Bd. of Equalization*, 11 Cal. (2d) 156, 162; *Standard Oil Co. v. Johnson*, 10 Cal. (2d) 758; 767-768.

operation and effect the tax is one upon the purchaser, and the California decisions have so held:

> "The clear intent of the law was to levy an excise or occupation tax upon distributors of motor vehicle fuel, giving such distributors, however, ample opportunity to fully indemnify themselves by adding the amount of the tax to the selling price of the fuel *and thus in effect collect the tax from the consumer*" (*People v. Ventura Refining Co.*, 204 Cal. 286, 294; *Rio Grande Oil Co. v. Los Angeles*, 6 Cal. App. (2d) 200, 201).

> "It is perfectly clear, as has been before stated, that the provisions themselves of the act of 1923 imposing a tax of two cents on every gallon of fuel gas, to be used in gas-propelled motor vehicles, show that the legislature, *ex industria*, intended that that plan *of imposing a privilege tax on those operating or causing to be operated such motor vehicles upon the highways* of the state should be in lieu of the registration fee such persons were theretofore required to pay. We, therefore, hold that the two acts of 1923 under consideration, in so far as they provide, respectively, for a registration fee for electric motor vehicles and the excise or privilege tax on gas for gas-propelled motor vehicles were intended to constitute a single plan or scheme *for compelling persons operating or causing to be operated motor vehicles upon the public highways of the state to pay a fee or a tax,* * * *" (*Old Homestead Bakery, Inc. v. Marsh*, 75 Cal. App. 247, 260-261).

That the tax in operation and in effect is one upon the purchasers follows from the statute itself. Section 11 provides (Appendix, pp. iv-v):

> "Any person * * * who shall buy and use any motor vehicle fuel for purposes other than in motor

vehicles operated upon the public highways * * *, or who shall export the same * * *, or any employee of the United States Government, who shall buy any motor vehicle fuel and use the same exclusively in the transportation of * * * mail * * * or the government of the United States * * * *who shall have paid any license tax for such motor vehicle fuel hereby required to be paid,* * * shall be reimbursed and repaid the amount of such license tax *paid by him or it* upon presenting to the State Controller an affidavit * * *."

In *Oswald v. Johnson*, 210 Cal. 321, and *Guardia v. Johnson*, 134 Cal. App. 574, the California courts directed refunds to be made, pursuant to this section, to persons who were not distributors but who had paid the tax on gasoline bought and used for purposes other than in motor vehicles operated upon the highways.

These authorities establish, as the Solicitor General of the United States heretofore has advised this Court,[22] that the challenged tax, in operation and effect, is one upon the purchaser. It follows that the statute, construed to impose the tax upon a federal instrumentality, is invalid. (See authorities cited, supra, pp. 24-25).

We should point out that in *Standard Oil Co. v. California*, 291 U.S. 242, this Court dealt with the same taxing act, and held that it imposes "taxes in respect of sales and deliveries"; that in operation the tax is a "tax upon transactions" (291 U.S., 244). If this view be adopted—

[22] In the "Tabular Annex" of "State Taxing Statutes classified as to incidence of the tax," appearing on page 29 of Appendix B to the brief for the United States in *Alabama v. King & Boozer*, supra (No. 602, October Term, 1941), the Motor Vehicle Fuel License Tax Act of California is classified as one imposing "Taxes on Vendee."

and where federal rights are asserted the decision of this Court as to the operation and effect of the statute is controlling[23]—the tax is one directly upon a transaction of the United States and for that reason also is invalid. (See authorities cited at pp. 24-25, supra.)

CONCLUSION.

We respectfully submit that the judgment of the court below should be vacated and the cause remanded for further proceedings.

Dated, San Francisco, California,
April 27, 1942.

Respectfully submitted,

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(Appendix Follows.)

[23] *Educational Films Corp. v. Ward*, 282 U.S. 379, 387; *Lawrence v. State Tax Comm.*, 286 U.S. 276, 280; *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 443-444.

Appendix.

Appendix A

CALIFORNIA MOTOR VEHICLE FUEL LICENSE TAX ACT.

"Sec. 3. A license tax is hereby imposed for the privilege of distributing, within the meaning of section 7 of this act, any motor vehicle fuel. Said license tax shall be according to or measured by the gallonage of motor vehicle fuel so distributed in this State and shall be at the rate of three cents for each gallon of such fuel refined, manufactured, produced, blended or compounded by such distributor in this State and so distributed by him in this State, or imported by such distributor into and so distributed by him in this State otherwise than in the original package or container in which such motor vehicle fuel was imported into this State, and for each gallon of motor vehicle fuel imported into this State and thereafter acquired by such distributor in the original package or container in which the same was imported and thereafter so distributed by such distributor otherwise than in the original package or container in which the same was imported into this State."

"Sec. 7. For the purposes of this act all motor vehicle fuel sold, donated, consigned for sale, bartered or used shall be deemed to be distributed, and to insure the proper administration of this act and to prevent evasion of the license tax hereby imposed it shall be presumed that all motor vehicle fuel refined, manufactured, produced, blended or compounded in this State, or imported into this State, and no longer in the possession of the distributor, has been distributed unless the contrary is established; provided, however, that the exchange of motor vehicle

fuel for motor vehicle fuel, gallon for gallon, shall not be considered a taxable distribution; and provided, that in lieu of the collection and refund of the tax on motor vehicle fuel used by a distributor in such a manner as would entitle a purchaser to claim refund under the provisions of section 11 hereof, credit may be given such distributor upon his tax return and assessment; and provided further, that under such regulations as the State Board of Equalization may prescribe, sales and other deliveries of natural gasoline may be made to a duly licensed distributor free of tax.

Nothing in this act shall be construed as requiring the payment of the license tax herein specified upon more than one sale, distribution or transfer of the same motor vehicle fuel."

"~~Sec. 10.~~ The provisions of this act requiring the payment of license taxes shall not be held or construed to apply to motor vehicle fuel imported into this State in interstate or foreign commerce and intended to be sold in the original and unbroken tank cars or other original receptacles, containers or packages and so sold while the same are in interstate or foreign commerce, nor to any motor vehicle fuel exported from this State by the distributor or delivered by the distributor to any vessel clearing from a port of this State for a port outside of this State and actually exported from this State in such vessel, nor to any motor vehicle fuel sold to the government of the United States or any department thereof for official use of said government, but every distributor shall be required to report such exports and sales to the State Board of Equalization in such detail as that board may

require, otherwise the exemption herein granted shall be null and void and all such fuel shall be considered distributed in this State subject fully to the provisions of this act.

Export certificates. In support of any exemption from license taxes claimed under this section on account of the exportation of motor vehicle fuel, every distributor must execute an export certificate in such form as shall be prescribed, prepared and furnished by the State Board of Equalization, containing a sworn statement, made by some person having actual knowledge of the fact of such exportation, that the motor vehicle fuel has been exported from the State of California, and giving such details with reference to such shipment as said board may require. All export certificates must be completed and on file in the office of the State Board of Equalization within sixty days after the close of the calendar month in which the shipments to which they relate are made, and no certificate not completed and filed within such period shall be recognized for any purpose by the State of California or any agency thereof. The State Board of Equalization may demand of any distributor such additional data as are deemed necessary by said board in support of any such certificate, and failure to supply such data will constitute a waiver of all right to exemption claimed by virtue of such certificate.

Time for making exemption claim. Any claim for exemption based on a sale to the United States government or any department thereof may be made by the distributor at any time within six months from the date of sale by filing such claim in the office of the State Board

of Equalization, but no claim made after the expiration of said period of six months shall be recognized for any purpose by the State or any agency thereof.

Sec. 11. Any person, firm, association or corporation who shall buy and use any motor vehicle fuel for purposes other than in motor vehicles operated upon the public highways of the State of California, or who shall export the same for use outside of this State, or any employee of the United States Government, who shall buy any motor vehicle fuel and use the same exclusively in the transportation of rural free delivery mail and special delivery mail or the government of the United States or any department thereof which buys motor vehicle fuel for official use of said government or department and on which fuel no claim for exemption from payment of the tax imposed by this statute could be filed in accordance with section 10 of this act and who shall have paid any license tax for such motor vehicle fuel hereby required to be paid, either directly or to the vendor from whom it was purchased, or indirectly by the adding of the amount of such license tax to the price of such fuel, shall be reimbursed and repaid the amount of such license tax paid by him or it upon presenting to the State Controller an affidavit supported by the original invoice or invoices showing such purchase, which affidavit shall be verified by the oath of the claimant and shall state the total amount of such fuel so purchased and that the claimant has paid the price thereof and the manner and the equipment in which the claimant has used the same; provided, however, that any motor vehicle fuel carried from this State in the fuel tank of a motor vehicle shall not be considered as exported from this State.

The State Controller, upon the presentation of such an affidavit and such invoice or invoices shall cause to be paid to such claimant, from the license taxes collected in accordance with the provisions of this act, an amount equal to the license taxes collected hereunder on such motor vehicle fuel; provided, however, that the State Controller shall have the right, if he so desires, in order to establish the validity of any claim, to examine the books and records of the claimant for such purpose and the failure upon the part of the claimant to accede to such demand shall constitute a waiver of all right to the refund claimed on the account of the transactions questioned. Such examination may be made either through employees of the office of the State Controller or of the office of the State Board of Equalization.

All such applications for refund based upon exportation of motor vehicle fuel from this State must be filed with the State Controller within ninety days from the date of exportation; all other applications shall be filed within twelve months from the date of the purchase of such motor vehicle fuel. Any application filed after the time herein prescribed shall not be considered for any purpose by the State Controller, the State Treasurer or the State of California."